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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re SERGIO A. GAMEZ On Habeas Corpus.	F061976 **OPINION**

ORIGINAL PROCEEDING; petition for writ of habeas corpus.

Michael Satris, under appointment by the Court of Appeal, for Petitioner Sergio A. Gamez.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Jessica N. Blonien and Krista L. Pollard, Deputy Attorneys General, for Respondent State of California.

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Petitioner Sergio A. Gamez, an inmate at the California Correctional Institution at Tehachapi (CCI), challenges his 2010 revalidation as an active associate of a prison gang. We conclude the revalidation is not supported by the requisite "some evidence."

FACTS AND PROCEDURAL HISTORY

On May 14, 1982, petitioner was sentenced to prison for 15 years to life, following his guilty plea to second degree murder in Los Angeles County Superior Court. On December 9, 2003, he was "validated," through California Department of Corrections and Rehabilitation (CDCR) processes, as an associate of the Mexican Mafia (EME) prison gang.[1]

On February 25, 2010, CCI's Institution Gang Investigations Unit completed a review of petitioner's then-current gang status. Utilized in this review was a confidential memorandum, dated April 7, 2009, of an interview conducted with an informant. The confidential informant identified petitioner as maintaining overall authority of all southern Hispanic inmates in that unit on behalf of EME.[2] In response, petitioner denied having any present association with any prison gang, and called into question the informant's reliability. Following a review of petitioner's written response and the evidence, together with an interview of petitioner, Institutional Gang Investigator (IGI) Adame concluded there was sufficient evidence to update petitioner as an EME

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[1] At the time, CDCR was the California Department of Corrections.

Petitioner does not challenge his 2003 validation or designation of EME as a prison gang.

[2] The confidential memorandum itself was not disclosed to petitioner. He was informed, however, of its existence and provided a general summary of the information it contained. With respect to reliability of the confidential source, petitioner was told some of the information had been corroborated through investigation, although the information so corroborated was not specified.

associate.[3] Petitioner's revalidation as an active EME associate was reviewed and approved by the Office of Correctional Safety.

Petitioner exhausted his administrative remedies, then filed a petition for writ of habeas corpus in Kern County Superior Court. The petition was denied. Petitioner then filed the instant petition, in which he claims he was denied due process with respect to the 2010 revalidation, and asserts the revalidation was based on false information. After soliciting an informal response, we appointed counsel for petitioner and issued an order to show cause why the relief requested should not be granted.

DISCUSSION

Issuance of an order to show cause implies a preliminary determination the petitioner has made a sufficient prima facie showing of specific facts that, if established, entitle him or her to relief. (*In re Large* (2007) 41 Cal.4th 538, 549.) Accordingly, petitioner now "bears the burden of proving, by a preponderance of the evidence, the facts on which his claim depends. [Citation.]" (*Ibid*.) Where, as here, resolution of the petition does not depend on disputed issues of fact, a court may grant or deny the relief sought without ordering an evidentiary hearing. (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497.)

Prison regulations require an inmate whose conduct endangers the safety of others or the security of the institution to be housed in a security housing unit (SHU). (Cal.

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[3] Petitioner has submitted, as an exhibit, a CDCR "GANG VALIDATION CHRONO (UPDATE/REVIEW)," dated February 25, 2010, and purportedly signed by Adame. This chrono says the IGI "has concluded there *is not* sufficient evidence to update [petitioner] as" an EME associate. (Italics added.) Respondent has submitted the same document, also purportedly signed by Adame, which says the IGI "has concluded there *is* sufficient evidence to update [petitioner] as" an EME associate. (Italics added.) According to respondent, the original chrono incorrectly stated the IGI's finding; the mistake was discovered and a corrected copy issued. Petitioner contradicts this, saying he has provided a true copy of the chrono, and that Adame, "without notice to [petitioner] and sub rosa," altered the chrono. We need not decide which party is correct.

Code Regs., tit. 15, § 3341.5, subd. (c).)[4] SHU's commonly segregate certain inmates and subject them to greater restrictions and fewer privileges. (*Madrid v. Gomez* (N.D.Cal. 1995) 889 F.Supp. 1146, 1228.) An inmate who is a validated prison gang member, as defined in section 3378, subdivision (c)(3), or associate, as defined in section 3378, subdivision (c)(4), is deemed to be a severe threat to the safety of others or the security of the institution. Accordingly, with exceptions not pertinent here, regulations mandate the placement of said inmate in a SHU for an indeterminate term. (§ 3341.5, subd. (c)(2)(A), par. 2.)

An inmate housed in a SHU as a gang member or associate, as petitioner has been, "may be considered for review of inactive status … when the inmate has not been identified as having been involved in gang activity for a minimum of six (6) years." (§ 3378, subd. (e).) An inmate who is categorized as inactive and who is otherwise suitable for SHU release is then transferred to the general population of a Level IV facility for a period of observation lasting up to 12 months, following which the inmate will be housed in a facility consistent with his or her safety needs or, if none, with his or her classification score.[5] (§ 3341.5, subd. (c)(5).)

In the present case, the source document utilized in reviewing petitioner's status was the April 7, 2009, memorandum that contained information from a confidential informant. The question is whether this was sufficient to support the revalidation.[6]

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[4] Further regulatory references are to title 15 of the California Code of Regulations.

[5] An inactive gang member or associate can be retained in a SHU "based on the inmate's past or present level of influence in the gang, history of misconduct, history of criminal activity, or other factors indicating that the inmate poses a threat to other inmates or institutional security." (§ 3341.5, subd. (c)(5).)

According to petitioner, he has a custody level point score of 19. It appears this is the minimum possible classification for a life prisoner. (See *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1028.)

[6] In paragraph 4 of the return, respondent appears to concede this memorandum constituted the sole basis for petitioner's revalidation as an active prison gang associate.

This court set out the applicable standard in *In re Furnace* (2010) 185 Cal.App.4th 649, 659:

> "Judicial review of a [CDCR] custody determination is limited to determining whether the classification decision is arbitrary, capricious, irrational, or an abuse of the discretion granted to those given the responsibility for operating prisons. [Citation.] In *Superintendent v. Hill* (1985) 472 U.S. 445, the United States Supreme Court considered the necessary quantum of evidence to satisfy the demands of due process: 'We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board.… This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced.…" [Citation.] Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.' (*Id*. at pp. 455-456.) The issue is simply whether the evidence in question permits a court to conclude that the administrator had reasons for his or her decision. [Citations.]"[7]

The foregoing standard has been termed "extraordinarily deferential." (*In re Zepeda, supra*, 141 Cal.App.4th at p. 1498.) Nevertheless, "'where the agency's interpretation of the regulation is clearly arbitrary or capricious or has no reasonable basis, courts should not hesitate to reject it' [citation]." (*In re Lusero* (1992) 4 Cal.App.4th 572, 575.)

Prison officials may base actions, such as those undertaken here, on confidential information without violating due process, so long as the record "contain[s] information

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[7] In *In re Jenkins* (2010) 50 Cal.4th 1167, 1175-1176, the California Supreme Court discussed the tests applicable to official action involving inmates. Although noting California courts have applied the "some evidence" test to adverse classification actions, the high court found that test to have "little relevance" where the only dispute was the validity of a particular regulation. We do not view *Jenkins* as suggesting the "some evidence" test is inappropriate where, as here, the disputed issue is the sufficiency of the evidence to support a CDCR decision revalidating an inmate as an active prison gang associate. (See *Bruce v. Ylst* (9th Cir. 2003) 351 F.3d 1283, 1287 [applying "some evidence" standard to inmate's claim he was denied due process because prison officials did not have sufficient evidence to validate him as a prison gang member].)

(confidential or otherwise) from which a reviewing court can conclude the hearing officer actually made a reliability and truthfulness determination, and that the determination is supported by evidence. [Citations.]" (*In re Jackson* (1987) 43 Cal.3d 501, 516; see *Bruce v. Ylst, supra,* 351 F.3d at p. 1288.) An inmate has no due process right to confront or cross-examine the confidential informant, or to be informed of that person's identity. (*In re Estrada* (1996) 47 Cal.App.4th 1688, 1696; *Toussaint v. McCarthy* (9th Cir. 1986) 801 F.2d 1080, 1101, abrogated in part on other grounds by *Sandin v. Conner* (1995) 515 U.S. 472, as stated in *Dunn v. Castro* (9th Cir. 2010) 621 F.3d 1196, 1203.) Rather, "prison officials may satisfy the inmate's right to procedural due process by documenting the reliability of the informant in a confidential report and submitting that report to the court for *in camera* review." (*Mendoza v. Miller* (7th Cir. 1985) 779 F.2d 1287, 1295.) Accordingly, we have reviewed the April 7, 2009, confidential memorandum, which was filed under seal as exhibit 6 to the return. We have also reviewed the confidential report respondent has proffered as corroboration, which was filed under seal as exhibit 7 to the return.

Regulations governing prison gang member/associate validation recognize the need for reliability. Section 3378, subdivision (c)(8)(H) states, in pertinent part:

> "Informants. Documentation of information evidencing gang affiliation from an informant shall indicate the date of the information, whether the information is confidential or nonconfidential, and an evaluation of the informant's reliability. Confidential material shall also meet the requirements established in section 3321…. The information may be used as a source of validation if the informant provides specific knowledge of how he/she knew the inmate to be involved with the gang as a member or associate.… Exclusive reliance on hearsay information provided by informants will not be used for validation purposes."

Subdivision (b)(1) of section 3321 in turn provides: "No decision shall be based upon information from a confidential source, unless other documentation corroborates information from the source, or unless the circumstances surrounding the event and the

documented reliability of the source satisfies the decision maker(s) that the information is true." Subdivision (c) of section 3321 states:

> "A confidential source's reliability may be established by one or more of the following criteria:
>
> "(1) The confidential source has previously provided information which proved to be true.
>
> "(2) Other confidential source[s] have independently provided the same information.
>
> "(3) The information provided by the confidential source is self-incriminating.
>
> "(4) Part of the information provided is corroborated through investigation or by information provided by non-confidential sources.
>
> "(5) The confidential source is the victim."

Respondent says the information identifying petitioner as the person exercising authority over the southern Hispanic inmates on behalf of the EME came from an inmate who was housed in the same living unit as petitioner and who interacted with other southern Hispanic and EME inmates while housed in petitioner's unit; hence, "the source provided the specific information on how he knew [petitioner] was involved with the prison gang and is a proper source demonstrating" petitioner's active participation in EME. As support for the claim the confidential informant interacted with other southern Hispanic and EME inmates while housed in petitioner's unit, respondent cites the first two pages of the April 7, 2009, memorandum. The interaction described there, however, did not occur in CCI's SHU; it occurred at an entirely different location. Thus, respondent's assertion that an inmate interacting with EME members would know who was in charge of those inmates, while possibly accurate insofar as a particular institution is concerned, finds no support in the record with respect to the circumstances of this case. In fact, the investigation described in the memorandum strongly suggests the confidential

informant likely was *not* interacting with active southern Hispanic or EME inmates at CCI.

Pointing to exhibit 7 of the return, respondent further contends reliability was sufficiently established because other reports and witness statements showed part of the information provided by the confidential informant was true. In our view, however, section 3321, subdivision (c)(4) cannot reasonably be interpreted as meaning corroboration through investigation of *any* part of the confidential source's information — no matter how attenuated with respect to the person against whom it is proposed to be used — is sufficient to establish reliability. This is especially so when, as here, it is unaccompanied by any "specific knowledge of how [the confidential informant] knew the inmate to be involved with the gang as a member or associate," as required by section 3378, subdivision (c)(8)(H). Even under the "some evidence" standard, prison officials' decisions must be supported by *evidence*, not merely by hunch or intuition, and some indicia of reliability. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1213; *In re Elkins* (2006) 144 Cal.App.4th 475, 489; *Cato v. Rushen* (9th Cir. 1987) 824 F.2d 703, 705 ["some evidence" standard not met where only evidence implicating inmate was hearsay statement related to prison officials by confidential informant who had no first-hand knowledge of any relevant statements or actions by target inmate].)

In light of the absence of corroboration of the confidential information related to CCI's SHU and petitioner, together with the lack of any showing how the confidential informant allegedly knew petitioner to be involved with EME, we conclude the confidential informant cannot reasonably be found to be reliable with respect to those subjects. As the information from the confidential informant was, insofar as the record shows, the sole basis for the 2010 revalidation of petitioner as an active associate of the

EME prison gang, it necessarily follows there is no evidence in the record that could support said revalidation. Accordingly, the revalidation cannot stand.[8]

DISPOSITION

Let a writ of habeas corpus issue directing the California Department of Corrections and Rehabilitation to (1) void the 2010 revalidation of petitioner Sergio A. Gamez (C47759) as an active associate of the Mexican Mafia (EME) prison gang, (2) cease classifying petitioner as an active gang associate based on the 2010 revalidation, and (3) cease housing petitioner in the SHU based on the 2010 gang revalidation.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.

[8] Given this conclusion, we do not reach petitioner's contention the review of his gang status was overdue or untimely. (See *In re Davis* (1979) 25 Cal.3d 384, 396-397.)